K.B.I. Security Services, Inc. *and* International Union, United Plant Guard Workers of America (UPGWA). Cases 34–CA–6495 and 34–CA–6667

January 10, 2000

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On April 3, 1997, Administrative Law Judge Stephen J. Gross issued the attached supplemental decision. Thereafter, the Respondent filed exceptions. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and brief and has decided to affirm the judge's rulings, findings, and conclusions, except as modified here, and to adopt the recommended Order as modified and set forth in full below.

This case is before the Board on remand from the United States Court of Appeals for the Second Circuit, which has directed inquiry into whether reinstatement is an appropriate remedy for discriminatees Orlando Febus and Hector Rosenthal in light of evidence that they may have engaged in unprotected conduct warranting discharge while working for the Respondent.[1] The judge found, and we affirm, that there is no proven basis for denying reinstatement to Rosenthal or Febus based on thefts that took place at the premises of a client where Respondent employed those two and others as security guards. He further found, however, that Febus' use of the telephone to make unauthorized calls at the same premises warranted denial of reinstatement. We disagree.[2]

Prior to its unlawful layoff and refusal to recall Febus and Rosenthal on May 21, 1994, the Respondent employed them as security guards on different shifts at the premises of Saturn of Stamford, an automobile dealership. Saturn terminated its contract with the Respondent as of May 30. Thereafter, Saturn received a telephone bill which included long-distance charges incurred during nonbusiness hours on Sunday, May 15. Eleven of those calls were made in close succession from 5:12 p.m. through 6:06 p.m. Another call was made at 8:13 p.m. With the exception of one call to Florida charged to a Saturn calling card, all calls were to various adult sex lines.

It is undisputed that Febus was on guard duty during the evening of May 15. Although the Respondent's Manager Anthony Netto testified that Febus' assigned duty hours were from 9 p.m. to 7 a.m., Febus' own handwritten time report for the night in question indicated that he was on duty from 6 p.m. to 7 a.m. Only Respondent's guards and certain management officials had access to the Saturn facility after it closed at 5 p.m. Febus testified that no one else was present at the facility during times when he was on duty. Febus had access to the Saturn telephone lines, but he was stationed in a garage and could not go into the interior of the Saturn dealership building. There is no evidence that he had access to a Saturn calling card. Febus testified that he did not make the calls and did not know who did.

On July 1, Saturn Controller Damian Sanatore faxed the May 15 phone bill and a copy of Febus' time report to Netto with a note stating "Tony—phone bill and guard report for Sunday 5–15–94—we close at 5 p.m. on Sundays. I am charging you back for this." On July 21, the Respondent terminated Febus. A preprinted separation record form memorializing the discharge includes checks in boxes for "unsatisfactory performance," "violation of company policy," and "other—due to loss of job site." There is no evidence that the Respondent considers a guard's unauthorized use of a customer's telephone to be grounds for discharge. Years earlier, the Respondent deducted $25 from Rosenthal's pay for unauthorized calls from a customer's facility and took no other action against him.

Controlling Board precedent, as correctly stated by the judge, holds that if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct.[3]

The judge first concluded that it was "far more probable than not that Febus made all the calls in question." Then, he expressed doubt whether the Respondent met its burden of proving, under the foregoing standard, that it would have discharged Febus when Saturn brought the calls to its attention. Nevertheless, the judge reasoned that "given the procedural posture of this case and the grotesque unseemliness of the May 15 calls themselves," the Board should not reinstate Febus and should toll his backpay as of July 21.

[1] See *KBI Security Service, Inc. v. NLRB*, 91 F.3d 291 (1996).

[2] We find no merit in the Respondent's exceptions to the judge's failure to reopen the record for the presentation of additional evidence. The Respondent had full opportunity to litigate the issue of the discriminatees' alleged misconduct in the original hearing. It cross-examined discriminatee Febus, introduced documentary evidence, and presented the testimony of Branch Manager Anthony Netto on this issue. Neither the court's opinion nor the Board's remand order, 322 NLRB 819 (1997), mandated reopening the record for further hearing. Although the judge invited the parties' statements of position "concerning the procedures to adopt in connection with the remand," the Respondent did not specifically request reopening the record. Finally, the Respondent makes no offer of proof concerning the additional evidence that it would adduce relevant to the reinstatement remedy issue.

[3] *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993).

Contrary to the judge, we find that there is insufficient proof that Febus made the disputed telephone calls. Saturn's Controller Sanatore admitted in his testimony that he had no proof other than the telephone bill and Febus' time report. That report does not place Febus on the premises earlier than 6 p.m., well after the series of calls had begun.[4] There is no evidence that Febus had a Saturn calling card, which was undisputedly used in making the one call to Florida. Furthermore, the fact that Febus did not believe anyone was present at the facility is not determinative. Febus did not have access to the interior of the Saturn building and could not state with certainty that no one remained there after business hours on May 15.

The Respondent bears the burden of proving that Febus engaged in the alleged misconduct. "Denial of reinstatement must be based on something more than a reasonable suspicion." *Big "G" Corp.*, 223 NLRB 1349 (1976). Viewed in its most favorable light, the evidence here proves nothing more than a reasonable suspicion that Febus made the calls.

Moreover, the only evidence of past practice shows that Rosenthal was required to make restitution for the cost of unauthorized calls but was not subjected to any discipline. Febus' termination report, executed by the Respondent after receipt of the telephone bill from Saturn, makes no specific reference to the calls as a basis for termination. There is no testimony that Netto or anyone else associated with the Respondent even mentioned the calls to Febus.

Based on the foregoing, we shall reverse the judge and order that that the Respondent offer reinstatement and full backpay,[5] to Febus as well as to Rosenthal.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, K.B.I. Security Services, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recall employees from layoff because the employees joined or assisted the International Union, United Plant Guard Workers of America (UPGWA) or any other union.

(b) Failing to recall employees from layoff because the employees gave testimony to the Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Hector Rosenthal and Orlando Febus full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Hector Rosenthal and Orlando Febus whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in this supplemental decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[4] Netto, the Respondent's agent, testified that Febus' shift did not begin until much later at 9 p.m., after all the calls had been made.

[5] Backpay for both Febus and Rosenthal shall run from May 21, 1994, to the date of their reinstatement, and shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail to recall employees from layoff because the employees joined or assisted the International Union, United Plant Guard Workers of America (UPGWA) or any other union.

WE WILL NOT fail to recall employees from layoff because the employees gave testimony to the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Hector Rosenthal and Orlando Febus full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Hector Rosenthal and Orlando Febus whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in this supplemental decision.

K.B.I. SECURITY SERVICES, INC.

SUPPLEMENTAL DECISION

INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge. K.B.I. Security Services, Inc. (KBI) is in the business of providing security guards. This case concerns KBI's Bridgeport, Connecticut, facility. At all relevant times Anthony Netto was the manager of that facility.[1]

I held a hearing in this proceeding on November 9 and 10, 1994. Subsequent to the hearing I ruled, in an Order dated November 28, 1994, that because KBI had not filed an answer in response to the complaint in Case 34–CA–6667, all allegations in that complaint "are deemed admitted." In my decision in this proceeding I accordingly found, "based on the allegations of the complaint in Case 34–CA–6667," that "since about May 21, 1994, KBI has failed and refused to recall its employees Orlando Febus and Hector Rosenthal from layoff" because of their union and other protected activities. I went on to conclude that KBI's refusal to recall Febus and Rosenthal from layoff violated Section 8(a)(1), (3), and (4) of the Act. I recommended that the Board order KBI to reinstate both employees and pay them backpay.

On August 9, 1995, the Board my affirmed my rulings, findings and conclusions and adopted my recommended Order. *K.B.I. Security Services*, 318 NLRB 268 (1995).

KBI petitioned the United States Court of Appeals, Second Circuit, for review; the Board cross-applied for enforcement.

In my November 28 Order I had noted that it was a "disagreeable order to have to issue" since "the impression I gained during the hearing is that . . . one of the two alleged discriminatees may have behaved reprehensibly during the time he purported to guard the premises of one of KBI's customers . . . ."[2] By those words I was referring to testimony indicating that cash was stolen and improper and expensive telephone calls were made from the premises of a customer of KBI during times when Febus may have been the only person in those premises.

The court, referring to those words of my November 28 Order, held that:

> If, in fact, Febus or Rosenthal engaged in theft while guarding a client of KBI, the remedy crafted here in inappropriate. A default judgment does not relieve the Board from considering the propriety of a remedy such as reinstatement. We conclude that reinstatement of a thief to a position with a security company is not an automatic remedy—and may not be a permissible remedy. Such a remedy is not tailored to the redress of an unfair labor practice. . . . and would impose an undue burden on KBI and its employees—who might find themselves unemployed if KBI attained a reputation for employing untrustworthy guards . . . . It appears from the ALJ's November 28 decision that he erroneously thought he lacked authority to consider the evidence concerning theft in formulating the remedy, and therefore misapprehended his power and duty to craft a remedy that was properly tailored to the circumstances of this case.
>
> . . . .
>
> The record before us, however, does not show whether it was Febus or Rosenthal, individually or together, who engaged in the thefts. Nor can we determine from the ALJ's order (which is cast in terms of his impression) whether the ALJ made a finding on this issue. We therefore . . . . remand to the Board for a further determination as to whether it is an appropriate remedy under the circumstances of this case to reinstate Febus and Rosenthal. In fashioning a proper remedy on remand, the Board has the authority and duty to consider all evidence and testimony introduced at the hearing and to remand to the ALJ as may be necessary for further development of the record.
>
> . . . .
>
> This case is remanded to the Board for a further determination as to whether reinstatement is an appropriate remedy.[3]

The Board accepted the court's remand, stated that it deemed the court's opinion to be the law of the case, and remanded the proceeding "for a hearing and supplemental decision on the issue of the appropriate remedy for Febus and Rosenthal." 322 NLRB 819 (1997).

By notice dated January 13, 1997, I advised the parties that I would consider their views "concerning the procedures to adopt in connection with the remand."[4] No party asked me to reopen the hearing.[5] Rather, the General Counsel took the position that the existing record showed that reinstatement and backpay were

[1] Netto represented KBI at the hearing in this proceeding and testified on behalf of KBI. Netto is not an attorney.

[2] Since the parties had not yet had an opportunity to file briefs, I was not in a position to make any findings.

[3] *KBI Security Service v. NLRB* 91 F.3d 291 (2d Cir. 1996).

[4] The Board's remand order specified that the hearing should be reopened only if I "should . . . deem it necessary."

[5] KBI, in its response to my notice, stated that "it believes that the Board's remand . . . must include full development of all the facts . . . ." (KBI's response did not otherwise touch on the procedures to follow in this remanded proceeding.) I do not read that as a request to reopen the hearing, especially since the notice specifically stated that "I am particularly interested in the parties' positions about whether I should order an oral evidentiary hearing." I did not receive KBI's response within the time specified in the Notice. (KBI apparently sent it to the wrong address.) But counsel for the General Counsel advised that he would not oppose my taking it into consideration.

appropriate remedies. KBI's position is that "[t]he intent of the Board's remand and of the opinion of the Court of Appeals is that a different remedy [from reinstatement and backpay] be applied."[6]

The Facts Concerning Orlando Febus

KBI began providing nighttime guard services to an automobile dealer, Saturn of Stamford (Saturn), starting in May 1991. In May 1994, Saturn ended its arrangement with KBI because of Saturn's dissatisfaction with the services KBI had been providing. Saturn was particularly concerned that one or more of the guards that KBI provided to Saturn may have been stealing small amounts of cash.

KBI had assigned Febus to the Saturn site beginning in late 1993. Febus generally worked at Saturn on Thursdays, Fridays, Saturdays, and Sundays. (The Monday, Tuesday, and Wednesday guard duty was generally handled by Rosenthal.) Febus' hours on all days except Sundays were 9 p.m. to 7 a.m. The record is not entirely clear about the hours of his Sunday work, but as will be discussed below, on Sundays he probably began no later than 6 p.m., again ending the next morning at 7 o'clock. Febus, presumably, missed some days of work. On those days KBI replaced him with various other employees, none of whose names appear in the record.

The Instances of Petty Theft at the Saturn facility

On several occasions in early 1994–that is, a few months, or less, after Febus began working at the Saturn site–Saturn's management discovered several instances of what a Saturn official called "petty theft." As a Saturn official testified, "[W]e had a couple of incidents where we had cash boxes being rifled; we had some Freon stolen once."[7]

It seemed to Saturn's management that the incidents occurred at times of the day when the dealership was closed and a KBI guard was on duty. But management was not certain that that was the case.

As to which of the guards were under suspicion, the record tells us only that Saturn's management was at all times clear that Rosenthal was *not* the guilty party. That leaves Febus and, perhaps, any temporary replacements for Febus or Rosenthal.

Febus testified that he "was not scheduled to work [on the dates] when the money was stolen." No other testimony touches on this point. The record contains no documentary evidence on this point, one way or the other.

In or about March 1994, Saturn ended the guards' access to the areas in which the thefts occurred. This is what Saturn's controller, Damian Sanatore, had to say about that:

> There was a pretty high level of frustration amongst the management of the dealership as to all these recurring incidents of . . . petty theft, just a nuisance value. And since we couldn't pinpoint whether it was an inside job or the security guards, we thought that by excluding the guards from having access to the premises, we could determine if they continued, it was an inside job. If they didn't continue, it might be a link to the guards on duty. That's the reason why we actually locked up the building and asked the guards to remain outside.
>
> JUDGE GROSS: Did you tell Mr. Netto [KBI's manager] that?
>
> THE WITNESS: Yes, I did, because we had a concern because there were no bathroom facilities outside the building which [was] awkward for the guards, but it was a step we had to take.
>
> Q. BY MR. NETTO: Were there any other incidents of thefts after the guards were removed from the actual building?
>
> A. I must confess that since we have locked up the building, we had no occurrences after that.

On April 20, 1994, Saturn ended its relationship with KBI, effective May 30, "in view of the numerous complaints referred to you . . . that we have been unable to solve" (in the words of Saturn's termination letter to KBI).

It is possible that it was Febus who was responsible for the petty thefts about which Sanatore testified. Their timing suggests the possibility of a link between them and Febus: They started within a few months after Febus began working at the Saturn site, they might well have occurred when Febus was on duty, and they no longer occurred after Febus, along with the other KBI personnel, was precluded from entering the part of the Saturn facility in which the thefts had occurred. Nonetheless, it seems as probable as not that someone else was the thief. Additionally, Febus remained in KBI's employ for months after the thefts occurred. KBI, it is plain, did not deem the thefts at the Saturn site as rendering Febus unfit for further employment.[8]

The May 15 Telephone Calls

In mid-June 1994, Saturn received its telephone bill for the month of May. The bill included the following charges for Sunday, May 15:[9]

[6] By order dated February 14, 1997, I concluded that the record need not be reopened and gave the parties further opportunity to discuss "whether reinstatement would be an appropriate remedy to accord Rosenthal and Febus." No party responded to my February 14 order.

[7] Testimony of Saturn Controller Sanatore.

[8] In this general connection, see *Big "G" Corp*., 223 NLRB 1349 (1976); *Holiday Inn of America of San Bernardino*, 212 NLRB 280 (1974), enf. denied 512 F.2d 1171 (9th Cir. 1975).

[9] The record is silent about whether KBI's guards had access to a Saturn calling card.

Time (p.m.) on May 15	Cost	Length Of call (min-utes)	Cost per minute	Number called	Place called	Saturn line (363-)
5:12	7.98	2	3.99	800–314–4629	AM call	1514
5:14	3.99	1	3.99	800–727–5683	AM call	1514
5:15	3.99	1	3.99	800–727–5683	AM call	1514
5:18	3.99	1	3.99	800–814–4634	AM call	1514
5:19	3.99	1	3.99	800–727–5683	AM call	1514
5:20	3.99	1	3.99	800–814–4635	AM call	1514
5:30	3.99	1	3.99	800–814–4629	AM call	1514
5:36	3.99	1	3.99	800–285–9037	AM call	1512
5:41	15.00	6	2.50	305–936–5201	North Dade, FL	1514 via Saturn calling card
5:49	31.92	8	3.99	800–587–9084	AM call	1513
6:01	19.95	5	3.99	800–587–9058	AM call	1512
8:13	19.95	5	3.99	800–587–9058	AM call	1514

Total Cost with tax: $133.77

Sanatore (Saturn's controller) checked to see what all those calls to 800 numbers were. He testified that they turned out to be "sex lines and stuff like that." (That testimony is not disputed.)

The telephone bill data alone virtually demand the conclusion that all of the calls were made by one person, with the possible exception of the 5:41 p.m. call to Florida. Most obviously, all of the calls except the one to Florida were to sex lines. Also, consider the timing of the calls. For the most part each call followed hard on the heels of the previous call. And at no time was more than one call in progress. Also note that several of the calls were to the same number: for example, the 6:01 a.m. call and the 8:13 a.m. call.

As I discuss below, Sanatore thought that Febus was the one who made the calls and informed Netto of that. The question is whether Sanatore was correct.

A key issue in this regard is this: what time of the day did Febus arrive at Saturn on Sunday, May 15? Keep in mind that the first of the calls in question was placed at 5:12 p.m. The last call ended about 8:18 p.m.

At all relevant times the Saturn facility closed at 5 p.m. on Sundays. After that no one but the KBI guard and a few members of management had access to any part of the facility. (As discussed earlier, starting in March the KBI guards could not enter parts of the Saturn facility. But the part to which they did have access also gave access to Saturn's telephone lines.)

Netto testified that on Sundays KBI's guards went on duty at Saturn at 9 p.m. even though the Saturn facility closed at 5 p.m. (Netto seemed unaware that this testimony did not square very well with his view that Febus made the calls—perhaps because Netto mistakenly thought that the telephone bill's reference to "AM call" meant that the call extended into the after-midnight hours.[10])

The handwritten report that Febus submitted regarding his guard duty during the night of May 15–16 states that he was on duty "6 pm–7 am (14 hrs)." I suppose "6 pm" could be a mistake—a dyslexic "9 pm." But there is the "14 hrs" entry, which would seem to indicate that Febus arrived at 5 p.m. (since 6 p.m. to 7 a.m. is only 13 hours) and certainly not at 9 p.m.

Febus testified that during the times he was on duty at Saturn no one else was present at the facility.

The odds are that Netto was wrong about the 9 p.m. starting time for guards at the Saturn facility on Sundays. Given Febus' report, it is far more probable than not that Febus began his duty at Saturn no later than 6 p.m. on May 15. And given that, it is also more probable than not that Febus made all the calls in question: One person made all the calls (as discussed above); Febus surely made the 6:01 and 8:13 a.m. calls (since his report and his testimony show that he and only he was at the Saturn facility at those times); and Febus had access to the facility starting at 5 p.m., whether or not he considered himself on duty as early as 5 p.m.

Febus testified that he did not make the calls in question. But since that testimony conflicts with documentary evidence and with Febus' testimony about being the only person present in Saturn facility, I give that testimony no weight.[11]

On July 1, Sanatore faxed Netto a copy of Saturn's phone bill for May 15, a copy of Febus' report for May 15–16, and a note that states:

> Tony–phone bill and guard report for Sunday 5–15–94—we close at 5 p.m. on Sundays. I am charging you back for this.

KBI laid off Febus on May 21. The first that KBI knew of the May 15 telephone calls was on July 1, when KBI received Saturn's bill for the calls. On July 21 KBI terminated Febus for

[10] At the hearing Netto argued that the telephone calls in question "began at 5:15 p.m. in the afternoon, and went through 7:00 o'clock the following morning." However "AM call" has nothing to do with the time of the call: it is listed under "place," i.e., place called; and, as noted above, the last call was made at 8:13 p.m. and ended 5-minutes later. (The telephone company concerned advises that "AM call" means "adult entertainment.")

[11] I do not base this finding on any evaluation of Febus' demeanor.

"unsatisfactory performance," violation of company policy," and "loss of jobsite." [12]

The General Counsel points to evidence showing that, years before these events, KBI concluded that Rosenthal had made $25 worth of unauthorized calls from a customer's facility. KBI took that $25 out of Rosenthal's paycheck but otherwise took no action against him. That, the General Counsel argues, shows that KBI does not consider a guard's unauthorized use of a customer's telephone to be of much import. The important point that that raises is that except for the document that shows that KBI terminated Febus on July 21 for "unsatisfactory performance" and "violation of company policy," there is no evidence that KBI considers that a guard's unauthorized use of a customer's telephone renders the guard unfit for further employment. Netto did not so testify. On the other hand, in considering an individual's fitness for further employment, the unauthorized use of a telephone to make a personal call is one thing; using a customer's telephone to run up more than $100 in charges for calls to sex lines is something else.

Orlando Febus–Conclusion

KBI laid off Febus and refused to recall him because of Febus's protected activities. The question is whether, if KBI had not done so, the Company would have terminated Febus's employment anyway when it learned (in July) of Febus's improper use of Saturn's telephones on May 15. See *Axelson, Inc.*, 285 NLRB 862, 865 (1987). As the Board put it in *Tel Data Corp.*, 315 NLRB 364, 367 (1994):

> [I]f an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct.[13]

It is not altogether clear that KBI has met this burden in that, as just discussed, there is only slim evidence that KBI "would have discharged any employee" (in the words of *Tel Data*) by reason of behavior comparable to Febus' on May 15. But given the procedural posture of this case and the grotesque unseemliness of the May 15 calls themselves, I conclude that the Board ought not order that KBI reinstate Febus and that Febus' backpay should end on July 21, 1994 (the date on which KBI terminated Febus' employment for unsatisfactory performance and violation of company policy).

Hector Rosenthal

There is no evidence that Rosenthal engaged in any activity that rendered him unfit for service with KBI. Indeed, Saturn's Sanatore testified that:

> We always had great faith and great trust in Mr. Rosenthal. In fact, we actually requested that he stay on as our guard. . . . He was a very reliable person.

I conclude that, in Rosenthal's case, the usual remedy ordered by the Board—reinstatement and backpay—is appropriate.

REMEDY

The court of appeals modified the Board's 1995 Order in this proceeding by—

> striking from it the sections that require Febus and Rosenthal to be reinstated with backpay; we modify the notice that KBI is required to post by striking the paragraphs that refer to Febus and Rosenthal.[14]

This remedy section and my recommended order reflect these modifications by the court of the Board's 1995 Order.

For the reasons stated in the Board's 1995 Decision and Order and in this supplemental decision, KBI must offer reinstatement to Hector Rosenthal and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from May 21, 1994, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As for Orlando Febus, KBI must make him whole for any loss of earnings and other benefits for the period May 21 to July 21, 1994, less any net interim earnings, plus interest as computed in *New Horizons for the Retarded*, supra.

The Board's Decision and Order in this proceeding required KBI to post notices at all of its facilities, not just at the Bridgeport office, "[b]ecause KBI's owner, Robert King, telephoning from KBI's main office in New York, plainly was the instigator of the violations of the Act" discussed in the decision.[15] The recommended Order similarly requires notices to be posted at all of KBI's facilities.

[Recommended Order omitted from publication.]

[12] The complaint refers only to Febus' layoff on May 21 (and KBI's failure to recall him), not to the July 21 event. Thus KBI's failure to answer the complaint does not constitute an admission that this July 21 action against Febus stemmed from Febus's protected activities.

[13] Quoting *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993).

[14] 91 F.3d 291.

[15] 318 NLRB at 270.